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Supreme Court, U.S.
FILED
MAR 20 2000
OFFICE OF THE CLERK

No. 2000-_____ 991861

IN THE
SUPREME COURT OF THE UNITED STATES

DENISE KENDRICK,

Petitioners,

vs.

STATE OF ALABAMA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court punished the petitioner for exercising her right to remain silent in violation of the petitioner's Fifth Amendment Right to Self-Incrimination and Eighth Amendment protection against cruel and unusual punishment?

2. Whether the Alabama Supreme Court and Alabama Court of Civil Appeals' failure to follow its own law regarding exceptions to preservation of error is a violation of the equal protection clause of the U.S. Constitution?

LIST OF PARTIES

Petitioner Denise Kendrick was the petitioner and appellant in the courts below. Respondent State of Alabama was the plaintiff and appellee in the courts below.

TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW..... i

LIST OF PARTIES..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT..... 4

CONCLUSION..... 5

TABLE OF AUTHORITIES

Case Law

Page

Guthrie v. State,
689 So. 2d 935, 942 (Ala. Crim. App. 1996)..... 5

Mitchell v. U.S.,
119 S. Ct. 1307, 56 U.S. 314, 143 L. Ed. 2d 424..... 5

U.S. Constitution

U. S. Constitution, Amendment V..... 2, 4, 5

U. S. Constitution, Amendment XIX..... 2 , 4, 5

U. S. Constitution, Amendment VIII..... 2, 4, 5

Appendix

Appendix A - Alabama Court of Criminal Appeals Opinion

Appendix B - Alabama Court of Criminal Appeals Opinion overruling application for rehearing

Appendix C - Alabama Supreme Court Opinion denying Petition for writ of certiorari

Appendix D - Dissenting opinion of Justice England

IN THE
SUPREME COURT OF THE UNITED STATES

DENISE KENDRICK,
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vs.

STATE OF ALABAMA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF ALABAMA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court filed on December 22, 1999.

OPINIONS BELOW

The decision of the Alabama Supreme Court was not reported. It appears in the Appendix hereto (hereinafter "Apx."), Appendix A. The dissenting opinion of Justice England was reported and it appears in the Appendix hereto, Appendix B. The decisions by the Alabama Court of Criminal Appeals were not reported. They appear in the Appendix hereto, Appendix C & Appendix D.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was filed on June 18, 1999. Apx. D-1. A timely application for rehearing was denied on August 13, 1999. A timely potion for certiorari was denied by the Alabama Supreme Court on December 22, 1999. This petition for certiorari was filed on March 17, 2000 within ninety (90) days of December 22, 1999. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V:

No person shall be ...deprived of life, liberty, or property, without due process of law...

Amendment XIV:

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Denise Kendrick was indicted on April 17, 1996 by a Grand Jury in the Circuit Court for Jefferson County, Alabama. The indictment charges the petitioner with two counts of possession of a forged instrument in the second degree.

On December 14, 1998, the jury found the petitioner guilty of two counts of possession of a forged instrument in the second degree. On January 4, 1999 the petitioner was sentenced to ten years on each count and the trial court ordered that the ten year sentences run consecutively. During the sentencing hearing, the trial court made several comments about the petitioner's failure to confess details about the incident for which she was convicted.

The petitioner filed a Motion to Reconsider sentence on January 19, 1999 alleging that the petitioner's sentence was cruel and unusual and, generally, unfair in light of the petitioner's personal and criminal history. The petitioner's Motion to Reconsider was denied on March 2, 1999.

The petitioner appealed her sentence to the Alabama Court of Criminal Appeals and alleged violations of her Fifth and Eighth Amendment Constitutional rights in her opening brief filed on April 9, 1999. The Court of Civil Appeals ruled that the petitioner failed to, specifically, raise the violation of her Fifth Amendment and that the petitioner's sentence was within the statutory range and therefore not a violation of the petitioner's Eighth Amendment.

The petitioner again raised the violations of both her Eight and Fifth Amendment's in her application for rehearing filed with the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals overruled this application on August 13, 1999.

The petitioner asked the Alabama Supreme Court to review the decision of the Alabama Court of Criminal Appeals in her petition for writ of certiorari to te Alabama

Supreme Court. The Alabama Supreme Court denied the petitioner's writ on December 22, 1999. Justice England dissented and opined that the Court should decide whether the trial judge punished the petitioner for her silence.

REASONS FOR GRANTING THE WRIT

I. The Court should decide whether the trial court wrongfully punished the petitioner for her silence.

The trial court violated the petitioner's Fifth and Fourteenth Amendment rights in three ways. First, The trial court drew only adverse inferences from Petitioner silence and no mitigating inferences from the petitioner's silence. Second, the trial court made improper comments about the petitioner's silence. Third, the trial court's insistence that the petitioner share details relating to the facts surrounding her conviction was based on his erroneous conclusion that the law permitted him to require the petitioner to make a post-conviction confession in order to mitigate her sentence.

The Alabama courts have attempted to circumvent this Court's precedent regarding impermissible comments about a petitioner's silence during sentencing. This Court should grant this writ in order to overrule the Alabama Supreme Court and require it to decide whether the trial court wrongfully punished the petitioner for her silence.

II This Court should decide whether forcing a petitioner to testify against herself at her sentencing hearing is also a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

The Eighth Amendment prohibits a trial court from subjecting a petitioner to cruel and unusual punishment. A violation of a petitioner's constitutional rights is an important issue of federal law that should be decided by this Court. It is clear that the petitioner's sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment for three reasons.

First, Petitioner was punished for lawfully refusing to

testify against herself. Second, the petitioner was convicted of possessing and uttering two, single forged instruments, but was punished for being an alleged participant in a sophisticated, high tech, inside fraudulent check conspiracy. Third, the petitioner, by the trial court's own admission, was arbitrarily punished more harshly than the "routine", similarly situated check forger.

This Court should overturn the decision of the Alabama Courts and rule that forcing a petitioner to testify against herself at her sentencing hearing is also a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

III The Court should decide if the Alabama Supreme Court's failure to follow its own law regarding exceptions to preservation of error is a violation of the petitioner's Fifth and Fourteenth Amendment rights to equal protection and due process.

The Alabama courts have carved out an exception to the general rule that a petitioner waives all grounds for challenge to a trial court's conduct if those challenges are not specifically outlined in the petitioner's objection at the trial court level. Specifically, a general objection will preserve a trial court error if the ground was so obvious that the trial court's failure to act constitutes prejudicial error Guthrie v. State, 689 So. 2d 935, 942 (Ala. Crim. App. 1996)

The petitioner filed a general objection to her sentence in her motion to reconsider. The petitioner acknowledges that the Motion to Reconsider does not list a Fifth, Eighth or Fourteenth Amendment violation. However, the petitioner submits that the trial court's impermissible comments and impermissible inferences are so obviously a violation of the petitioner's Fifth, Eighth and Fourteenth Amendment rights that the petitioner's Motion to Reconsider's general objection to her sentence falls into the exception to the general rule for

preserving error at the trial level. Guthrie v. State, 689 So. 2d 935, 942 (Ala. Crim. App. 1996)

The Alabama court completely failed to address this issue. The Alabama court's failure to address this issue violates the petitioner's right to equal protection and due process under law.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully Submitted,

LEE WENDELL LODER, Counsel of Record
Attorney for Petitioner

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FRANCIS* ALLEN LONG, *SR.
Presiding Judge
H. WARD McMILLAN
***SUE BELL* COBB**
PAMELA W. BASCHAB
JAMES H. FRY
Judges

Clerk's Office
(334) 242-4590

MEMORANDUM

CR-98-0700
CC-96-1629, 1630

Jefferson Circuit Court No.

Denise Kendricks v. State

Affirmed by **memorandum.**

The appellant, Denise Kendricks, was convicted of two counts of criminal possession of a forged instrument in the second degree, a violation of § 13A-9-6. The appellant was sentenced on January 4, 1999 to serve two consecutive terms of ten years' imprisonment.

The appellant contends that the trial court's sentence was based on "arbitrary, capricious and impermissible adverse inferences" drawn from the appellant's silence. The appellant claims this alleged action by the trial court was a "blatant violation of [her] rights against self incrimination."(Appellant's brief at pg. 6.)

First and foremost, we find that this particular issue was not presented to the trial court either by objection at the sentencing hearing, motion for a new trial, or motion to reconsider sentence. We note that the appellant did file a motion to reconsider sentence wherein she made various assertions of her good character and raised an issue alleging cruel and unusual punishment arising from the consecutive nature of the sentences rendered by the trial court. Specifically, the appellant argued "convicting the Defendant and not running the two case[s] concurrently, would be considered cru[el] and unusual punishment based up[on] the [facts of the] inc[ident] involved [--] two check[s] in the amount [of less than a Hundred Dollars ($100.00)." (CR. 40.) The appellant did not raise any issue regarding any violation of the appellant's rights against self incrimination at the trial court level. It is raised for the first time on appeal; therefore, it is not preserved for review. See T.D.T. v. State [Ms. CR-97-1071, October 23, 1998] _ So.2d _ (Ala.Cr.App. 1998); Stinson v. State, 669 So.2d 1010 (Ala. 1995); and Faircloth v. State' 471 So.2d 485, 493 (Ala.Cr.App. 1984). "An issue raised for the first time on appeal is not correctly before this court." Buice v. State, 574 So.2d 55, 57 (Ala.Cr.App. 1990). Furthermore, an objection must specifically point out the particular ground, so that the trial judge may make an informed decision on the issue., Ex parte Weaver, 530 So.2d 258 (Ala. 1988). All grounds not specified are waived on appeal. Reeves v. State, 456 So.2d 1156 (Ala.Cr.App. 1984).

Nevertheless, the offense of criminal possession of a forged instrument in the second degree is a Class C felony. § 13A-9-6 (b), Ala. Code 1975. Pursuant to § 13A-5-6(a)(3), Ala. Code 1975, the statutory sentencing range for a Class C felony is "not more than 10 years or less than I year and I day." The sentence imposed by the trial court was clearly within the statutory range. Moreover, pursuant to § 14-3-38, Ala. Code 1975, "when a convict is sentenced to imprisonment in the penitentiary on two or more convictions, unless it is specifically ordered in the judgment entry that such sentences be served

concurrently, such sentences shall be cumulative and shall be served consecutively..... See also Hopper v. State, 420 So.2d 853, 854 (Ala.Cr.App.1982). "'The question of whether a sentence for conviction of a crime is to be consecutive or concurrent is within the sound discretion of the trial [court]. Clift v. State, 352 So.2d 838 (Ala.1977), [cert. denied, 435 U.S. 909, 98 S.Ct. 1459, 55 L.Ed.2d 500 (1978)]'" McLemore v. State, 562 So.2d 639 (Ala.Cr.App.1989), quoting Brown v. State, 367 So.2d 557, 559 (Ala.Cr.App. 1978). Where a trial judge imposes a sentence within the statutory range of punishment, this court will not review that sentence. See Sinkfield v. State, 669 So.2d 1026, 1028 (Ala.Cr.App. 1995); Garner v. State, 606 So.2d 177, 182 (Ala.Cr.App. 1992); Harris v. State, 500 So.2d 1292, 1296 (Ala.Cr.App. 1986). "'Sentencing is within the exclusive realm of the trial court.'" Read v. State, 686 So.2d 563, 568 (Ala.Cr.App. 1996), quoting Britton v. State, 631 So.2d 1073, 1080 (Ala.Cr.App. 1993).

Accordingly, we find that the sentence imposed by the trial court was proper in that the term itself, as well as the manner in which the appellant will serve the term, was within the applicable statutory range. We find no abuse of the discretion by the trial court in sentencing the appellant.

Based on the foregoing, the judgment of the trial court is affirmed.

Long, P.J., and McMillan, Cobb, Baschab, and Fry, JJ., concur.

COURT OF CRIMINAL APPEALS
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FRANCIS ALLEN LONG, *SR.*
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Hon. Polly Conradi, Circuit Clerk RE: CR-98-0700

Denise Kendricks v. State of Alabama (Appeal from Jefferson Circuit Court: CC96-1629;1630).

Hon. Lee Wendell Loder, Attorney

Dear Sir or Madam:

You are hereby notified that on August 13th, 1999 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled. 39(k) Motion Denied.

Lane W. Mann
Clerk Court of Criminal Appeals

LWM/jz

IN THE SUPREME OF ALABAMA
December 22, 1999

1982068

Ex parte Denise Kendricks. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Denise Kendricks v. State of Alabama) (Jefferson Cir.Ct.No.: CC-96-1629;1630) (Low'r.App.Ct.No.: CR-98-0700)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been dulv submitted, IT IS *CONSIDERED AND* ORDERED that the petition for writ of certiorari is denied. NO OPINION. (Dissent by England, J., 2 pp.)

COSTS TAXED TO PETITIONER.

HOUSTON, J. - Hooper, C.J., and Maddox, Cook, See, Lyons, Brown, and Johnstone, JJ., concur; England, J., dissents.

I, Robert G. Esdale, Clerk of the Supreme Court of Alabama, do hereby Certify that the foregoing a full, true and correct copy of the instruments herewith set out as same appear(s) of record in said Court.
Witness my hand this 22nd day of Dec., 1999
"s/Robert Esdale".
Clerk, Supreme Court of Alabama

ENGLAND, Justice.

I respectfully dissent. The Court should consider whether the trial judge punished the defendant for exercising her right to remain silent during the sentencing hearing. The trial judge sentenced the defendant to serve 2 consecutive terms of 10 years for her convictions of two counts of forgery in the second degree; ten years is the maximum term provided by law. These were the defendant's first offenses. Forgery is a Class C felony, carrying a sentencing range of 1 to 10 years. Ala. Code 1975, §§ 13A-5-6 and 13A-9-3. The defendant, though a first-time offender, received on each count the maximum sentence allowed by law.